

70 FLRA No. 179

UNITED STATES
DEPARTMENT OF STATE
BUREAU OF CONSULAR AFFAIRS
PASSPORT SERVICES DIRECTORATE
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
(Union)

0-AR-5320

DECISION

October 22, 2018

Before the Authority: Collen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In this case, the Authority holds that an Agency is obligated to follow contractually agreed-to vacancy-announcement timeframes when posting for Pathways Internship Program vacancies.

Arbitrator Roger P. Kaplan found that the Agency violated the parties' agreement by failing to keep two vacancy announcements open for three weeks. He further found that the Agency failed to establish that there is a past practice modifying that provision.

The Agency files exceptions arguing that the award is contrary to law. Because the Agency fails to show that the award is contrary to the cited government-wide regulations or Authority precedent, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency announced vacancy announcements for two Pathways Internship Program (Program) positions, but posted the announcements for less than three weeks. Article 15, Section 3(d) of the parties' agreement requires that vacancy

announcements be posted for three weeks.¹ The Union filed a grievance alleging that the Agency violated the agreement.

The Agency denied the grievance. The Agency asserted, as relevant here, that the Union could not challenge the vacancy announcements because they were posted by Shared Services, a separate Agency component with which the Union has no representational recognition. The Agency also asserted that there is a past practice under which vacancy announcements are posted for less than three weeks.²

The parties could not resolve the grievance and invoked arbitration.

The Arbitrator framed the issues as whether "the Agency violate[d] Article 15, Section 3(d) of the . . . collective bargain[ing] agreement," and whether "the Agency establish[ed] the existence of a past practice of keeping vacancy announcements open for less than three . . . weeks."³

Relying on the testimony of both Agency and Union witnesses, the Arbitrator found that Program positions are bargaining-unit positions,⁴ and, because Program positions are bargaining-unit positions, the Arbitrator found that the Agency "was obligated by [the contract] to keep the vacancy announcement[s] open for three . . . weeks."⁵ By failing to keep the Program vacancies open for three weeks, the Arbitrator concluded, the Agency violated the parties' agreement.⁶

The Arbitrator further rejected the Agency's argument that the Union could not challenge how the Agency operates the Program. According to the Arbitrator, although the Agency operates the Program under a memorandum of understanding (MOU) with OPM,⁷ Article 15, Section 3 was not "supercede[d]" by the MOU or any law or regulation which would prevent the Agency from complying with the three-week posting requirement established in that provision.⁸ On this record, the Arbitrator found that

¹ Award at 5 (citing Art. 15, § 3(d)).

² *Id.* at 5-6.

³ *Id.* at 3.

⁴ *Id.* at 7-8, 16.

⁵ *Id.* at 18-19.

⁶ *Id.* at 19.

⁷ *Id.* at 24. 5 C.F.R. § 362.104(a) requires an MOU between OPM and an agency "in order to make any appointment under a [Program] authority." The Agency did not introduce the MOU into evidence.

⁸ Award at 27.

nothing restricted the Agency from requesting Shared Services, its “agent,”⁹ to keep Program vacancy announcements open for three weeks.¹⁰

The Arbitrator also rejected the Agency’s claim that a past practice shortened the contractual timeframe for keeping vacancy announcements open. Specifically, he found that the Agency did not establish that there is “a consistent practice” of leaving vacancy announcements open for less than three weeks,¹¹ or that the Union was “aware of” and “acquiesced” to such a practice.¹²

Therefore, the Arbitrator concluded that the Agency violated Article 15, Section 3(d) and failed to establish a past practice modifying that provision. As the sole remedy, the Arbitrator directed the Agency, going forward, to comply with subsection (d) by keeping vacancy announcements for bargaining-unit positions open for at least three weeks.

The Agency filed exceptions to the award on October 19, 2017, and the Union filed an opposition to the Agency’s exceptions on November 17, 2017.¹³

III. Analysis and Conclusions: The award is not contrary to law.

When an exception involves an award’s consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.¹⁴ In applying the standard of de novo review, the Authority assesses

whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.¹⁵ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings, unless the appealing party establishes that those findings are “nonfacts.”¹⁶

A. The award is not contrary to government-wide regulations.

The Agency contends that the award is contrary to OPM regulations, 5 C.F.R. §§ 362.104 and 105(b).¹⁷ Section 362.104(a) requires an MOU between OPM and an agency “in order to make any appointment under [Program] authority.”¹⁸ Section 362.105(b) addresses Program vacancy announcements and provides that “[w]hen an agency accepts applications from individuals outside its own workforce, it must provide OPM information concerning [Program] job opportunities.”¹⁹

The Agency fails to explain how the award is contrary to these regulations. As the Arbitrator found, the applicable regulations do not permit the Agency “to ignore” the contractually established three-week announcement period and do not even address how long Program vacancy announcements should be open.²⁰

The Agency also argues, but fails to explain why, the Union should not be able to challenge the way the Agency announces vacancies under the Program.²¹ The Agency made this argument before the Arbitrator, but “did not introduce the MOU” into

⁹ *Id.* at 13.

¹⁰ *Id.* at 25 (citing Agency witness, who oversees the [some other term] Program for the Department and testified that “there was nothing [i]n the OPM regulations which require[d] that vacancy announcements be open for less than three . . . weeks”).

¹¹ *Id.* at 23.

¹² *Id.*

¹³ The Union filed a motion to dismiss the Agency’s exceptions. The Union asserts that although the exceptions were timely filed, and included a statement of email service on the Union, it did not receive the exceptions until five days after they were filed with the Authority. Motion to Dismiss (motion) at 2-3. When a party serves timely exceptions on an opposing party, the Authority views such service to be procedurally sufficient, unless the opposing party demonstrates that it has been prejudiced by such service. *U.S. Dep’t of Transp., FAA*, 68 FLRA 402, 403 (2015). The Union has not shown that it was prejudiced by the asserted delay in service. Accordingly, we deny the Union’s motion.

¹⁴ *U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Nat’l Weather Serv.*, 67 FLRA 356, 358 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹⁵ *Id.* (citing *U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

¹⁶ *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (*DHS*) (citing *U.S. Dep’t of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

¹⁷ The Agency also argues the award is contrary to Exec. Order No. 13,562, which established the Pathways Program of which the Program is a part. Exec. Order No. 13,562 directed OPM to issue the regulations implementing the Program.

¹⁸ 5 C.F.R. § 362.104(a).

¹⁹ *Id.* at § 362.105(b).

²⁰ Award at 12-13 (the Agency witness, who oversees and administers the Program for the Department, “agree[s] that there [is] nothing [i]n the OPM regulations” which mandate how long vacancy announcements should be open); *id.* at 25-26.

²¹ *Id.* at 24; *see also* Exceptions at 6.

evidence.²² Because the Agency could have, but did not present the MOU to the Arbitrator, we do not consider it here.²³

Additionally, the Agency argues that an OPM Program handbook gives the Agency sole authority to determine how long a Program vacancy will be posted and to limit the number of applicants.²⁴ As discussed above, neither the MOU nor the handbook address how long Program announcements will be posted, but the parties' agreement clearly requires a three-week posting.

Finally, the Agency argues that it has no authority over decisions concerning Program announcements because Shared Services, another Agency component, administers these announcements.²⁵ However, at arbitration, the Agency admitted that Shared Services acted as its "agent."²⁶

Accordingly, the Agency has not established that the award is contrary to OPM regulations. We therefore deny this exception.

- B. The Agency failed to prove the existence of a past practice.

The Agency argues that the award is contrary to precedent concerning how past practices

are established.²⁷ In determining whether a party has demonstrated the existence of a past practice, the Authority considers whether the alleged practice is "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other."²⁸

The Arbitrator found that the Agency failed to establish a "consistent practice" of issuing vacancy announcements for less than three weeks, or that the Union was "aware of" and "acquiesced" in the "alleged practice."²⁹ More importantly, the Authority has held that "arbitrators may not modify the plain and unambiguous provisions of an agreement based on parties' past practices,"³⁰ and Article 15, Section 3(d) is unambiguous about the length of vacancy postings for bargaining-unit positions. The Agency's remaining arguments challenge the Arbitrator's factual findings, but the Agency does not argue that the award is based on nonfacts.³¹ In applying de novo review, the Authority defers to an arbitrator's factual findings, absent a demonstration that those findings are nonfacts.³²

Accordingly, the Agency fails to demonstrate that the award is contrary to law and we deny this exception.

IV. Decision

We deny the Agency's contrary-to-law exceptions.

²² Award at 25. The Agency also raises an argument here that it did not raise before the Arbitrator – that the Agency must inform OPM of its method of accepting applications and any requirement contrary to government-wide regulations. Exceptions at 6. Under § 2429.5, "[t]he Authority will not consider any evidence [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5; *see also* 5 C.F.R. § 2425.4(c) (exceptions may not rely on any "evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator"); *U.S. Dep't of VA, VA Med. Ctr., Dayton, Ohio*, 65 FLRA 988, 991 (2011) (dismissing exceptions based on agency argument concerning job qualifications in agency handbook, where argument could have been raised before the arbitrator but did not). The Agency clearly could have made this argument to the Arbitrator, and because it did not, we do not consider it here.

²³ 5 C.F.R. §§ 2425.4(c), 2429.5. The Agency submits the MOU with its exceptions. But even if the MOU was properly submitted as evidence, the Agency does not identify any provision in the MOU that supports its argument.

²⁴ Exceptions at 5.

²⁵ *Id.* at 6.

²⁶ Award at 13.

²⁷ *Id.* at 7.

²⁸ *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015); *U.S. DOL, Office of the Assistant Sec'y for Admin. & Mgmt., Dall., Tex.* 65 FLRA 677, 679 (2011) (citing *SSA, Office of Hearing & Appeals, Montgomery, Ala.*, 60 FLRA 549, 554 (2005)).

²⁹ Award at 22-24.

³⁰ *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (*SBA*) (Member DuBester dissenting). Member DuBester notes, as he stated in *SBA*, that the majority's decision to reverse the Authority's past-practice precedent "conflicts with the clear weight of other authority that has addressed the subject." *Id.* at 531 & n.23.

³¹ *See* Exceptions at 14.

³² *DHS*, 67 FLRA at 690.